

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ULISES COPAS-VILLEGAS,

Defendant.

No. CR-08-0021-RHW
CR-12-0021-RHW**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

Before the Court are Defendant's Motions to Dismiss Indictment, ECF No. 48, and to Dismiss Petition for Violation of Supervised Release, ECF No. 66, both filed on August 10, 2012. A pretrial conference occurred in the above-captioned matter on September 17, 2012, in Spokane. Defendant Ulises Copas-Villegas was present and represented by John Loeffler. Assistant United States Attorney Pam Byerly represented the Government. After reviewing the submitted material and relevant authority and hearing from counsel, the Court is full informed.

Defendant is charged with his second unlawful reentry in violation of 8 U.S.C. § 1326. He now moves to dismiss the Indictment (CR-12-0021-RHW) and underlying petition for violation of Supervised Release (CR-08-0021-RHW). Defendant attempts to collaterally attack his underlying deportation order and argues that immigration officials erroneously concluded that his 2003 state drug conviction constituted an aggravated felony. Defendant contends that conviction was the only basis for his 2004 final administrative removal order, and the Government violated his Due Process rights and he suffered prejudice -- as he should have been advised of his eligibility for voluntary departure. The

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1 Government filed its Response in opposition. ECF No. 62. Defendant has replied.
2 ECF No. 63.

3 **BACKGROUND**

4 On January 17, 2003, Mr. Copas-Villegas was convicted in King County
5 Superior Court, on one felony count of violating the Uniform Controlled
6 Substances Act, Possession with Intent to Deliver a Controlled Substance, Cocaine,
7 in violation of Wash. Rev. Code § 69.50.401(a)(1)(i). ECF No. 48-2, Ex. C. The
8 Washington state court sentenced him to 30 months, finding an exceptional
9 sentence justified. ECF No. 62-1, Ex. 1. Thereafter, on July 31, 2003, the
10 Immigration and Naturalization Service (legacy “INS”) initiated deportation
11 proceedings against Mr. Copas-Villegas, an illegal alien, by issuing a Notice of
12 Intent to Issue a Final Administrative Removal Order (“Notice of Intent”). ECF
13 No. 62-2, Ex. 2. The Notice of Intent stated that Mr. Copas-Villegas would be
14 subjected to expedited administrative removal proceedings based on the previous
15 state narcotics conviction, which the INS determined was an aggravated felony. On
16 August 7, 2003, INS issued a Final Administrative Removal Order, based on the
17 same conclusions as the Notice of Intent, and ordered Mr. Copas-Villegas removed
18 from the United States. ECF No. 48-2, Ex. B. On February 20, 2004, Mr. Copas-
19 Villegas was deported to Mexico. *Id.* at Ex. A.

20 On February 20, 2008, Mr. Copas-Villegas was found in the United States in
21 Chelan County, and indicted in the Eastern District of Washington, CR-08-021-
22 RHW, for a violation of 8 U.S.C. § 1326. ECF No. 1. Mr. Copas-Villegas was
23 charged federally in connection with three Washington state charges for First
24 Degree Conspiracy to Commit Burglary, Attempting Elude a Police Vehicle, and
25 Possession of a Stolen Firearm. ECF No. 62-3, Ex. 3. Mr. Copas-Villegas pleaded
26 guilty to the state charges on June 2, 2008, and received 23.25 months on Count 1,
27 6 months on Count 2, and 20 months on Count 3 – all to run concurrently. *Id.* On
28 November 14, 2008, Mr. Copas-Villegas pleaded guilty to one count of illegal

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1 reentry, pursuant to a “Fast Track” plea agreement. ECF Nos. 22-23. This Court
2 sentenced him to 33 months on the same date, to run consecutively with his state
3 sentences, and a three-year term of supervised release. ECF No. 24.

4 After serving his sentences on the 2008 state and federal convictions, Mr.
5 Copas-Villegas was again set up for administrative removal. ECF No. 62 at 3. On
6 March 3, 2011, the Department of Homeland Security (“DHS”) issued him a
7 Notice of Intent/Decision to Reinstate Prior Order. ECF No. 62-4, Ex. 4. A final
8 Decision, Order, and Officer’s Certification was entered on March 22, 2011, and
9 Mr. Copas-Villegas was served with a Warning to Alien Ordered Removed on
10 Deported on April 1, 2011. *Id.* at Ex. 4-5. Mr. Copas-Villegas was eventually
11 deported on August 11, 2011, pursuant to the reinstatement of his 2004
12 administrative removal order. ECF No. 48-2, Ex. F.

13 On or about February 8, 2012, Mr. Copas-Villegas was again found in the
14 United States in Chelan County, Eastern District of Washington, and on February
15 22, 2012, he was indicted, CR-12-021-RHW, on one count of being an alien in the
16 United States following deportation, in violation of 8 U.S.C. § 1326. ECF No. 19.
17 The Indictment indicates that it is based on the 2011 removal date, which is a
18 reinstatement of the 2004 administrative removal order. *Id.* Mr. Copas-Villegas is
19 also before the Court on the underlying supervised release violation in CR-08-021-
20 RHW. ECF No. 53.

21 ANALYSIS

22 Under 8 U.S.C. § 1326(a), an alien is criminally liable if he is found in the
23 United States after he “has been denied admission, excluded, deported, or
24 removed,” without consent of the Attorney General or other advance consent. The
25 existence of a prior removal order is a predicate element in a § 1326 illegal reentry
26 offense. Therefore, under § 1326(d), a defendant charged with this offense may
27 collaterally attack the underlying removal order by establishing: 1) that he
28 exhausted any administrative remedies that were available to seek relief against the

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1 order; 2) improper deprivation of the opportunity for judicial review; and 3) that
2 the entry of the deportation order was fundamentally unfair. *United States v.*
3 *Camacho-Lopez*, 450 F.3d 928, 929 (9th Cir.2006) (citing 8 U.S.C. § 1326(d)).

4 The Court starts with the last requirement: fundamental unfairness. A
5 deportation order is “fundamentally unfair” if 1) the alien's due process rights were
6 violated during the underlying deportation proceeding and 2) he suffered prejudice
7 as a result. *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir.1998),
8 *overruled on other grounds by United States v. Corona-Sanchez*, 291 F.3d 1201
9 (9th Cir. 2002) (en banc); *see also United States v. Ubaldo-Figueroa*, 364 F.3d
10 1042 (9th Cir.2004). To demonstrate prejudice, the defendant need only establish
11 he had a “plausible” basis for relief from deportation. *See United States v. Ramos*,
12 623 F.3d 672, 680 (9th Cir. 2010). The defendant need not prove he would have
13 actually avoided deportation. *United States v. Jimenez-Marmolejo*, 104 F.3d 1083,
14 1086 (9th Cir. 1996).

15 Mr. Copas-Villegas now brings the instant Motion to Dismiss, ECF No. 48,
16 and collaterally attacks the underlying deportation order. Mr. Copas-Villegas
17 argues that his 2004 deportation, upon which the current charge is based, violated
18 his Due Process rights and he suffered prejudice as a result of INS’s erroneous
19 conclusion that his prior conviction under Wash. Rev. Code § 69.50.401(a) was an
20 aggravated felony subjecting him to expedited removal under 8 U.S.C. § 1228(b).
21 ECF No. 49. The Government counters that Mr. Copas-Villegas’s conviction
22 qualifies as an aggravated felony and Defendant’s 2004 removal and 2011
23 reinstatement of the prior order were valid, comported with due process, and he
24 suffered no prejudice as a result. ECF No. 62.

25 Under the expedited administrative removal process an individual who has a
26 prior aggravated felony is considered deportable without appearing before an
27 immigration judge, having a hearing, or being advised of any other possible forms
28 of relief. *See* 8 U.S.C. § 1228(b). This conclusion precluded Mr. Copas-Villegas

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1 from having a deportation hearing where an immigration judge would have advised
2 him of the voluntary departure option and, had he exercised it, he would not have a
3 prior deportation on his record which makes up the § 1326 charge in this case.
4 ECF No. 49 at 2.

5 Voluntary departure is precluded from only two classes of immigrants,
6 “those involved in terrorism-related activity (not at issue here), and those . . .
7 convicted of an aggravated felony.” *United States v. Ortiz-Lopez*, 385 F.3d at
8 1202, 1204 n. 3 (internal quotation marks omitted); *see also* 8 U.S.C. § 1229c(b).
9 Thus, the question here is whether Mr. Copas-Villegas’s Possession with Intent to
10 Deliver a Controlled Substance, Cocaine, conviction was an aggravated felony. If
11 so, voluntary departure was unavailable to Mr. Copas-Villegas, the underlying
12 deportation proceedings comported with Due Process and the use of the expedited
13 administrative removal proceedings did not prejudice him by precluding him from
14 exercising the voluntary departure option.

15 **A. Whether the Prior Felony Was an Aggravated Felony**

16 An aggravated felony is defined in 8 U.S.C. § 1101(a)(43)(B) as: “illicit
17 trafficking in a controlled substance (as defined in section 802 of Title 21),
18 including a drug trafficking crime (as defined in section 924(c) of Title 18).”
19 Section 924(c)(2) provides that “[f]or purposes of this subsection, the term ‘drug
20 trafficking crime’ means any felony punishable under the Controlled Substances
21 Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21
22 U.S.C. 951 et seq.), or chapter 705 of title 46.” This definition provides two
23 options for a state felony to qualify as an aggravated felony: 1) if the state crime
24 “contains a trafficking element” and 2) if the crime would be punishable as a
25 federal felony under the Controlled Substances Act (“CSA”). *See Rendon v.*
26 *Mukasey*, 520 F.3d 967, 974 (9th Cir.2008). Whether Mr. Copas-Villegas’s
27 Washington state narcotic offense is an aggravated felony is analyzed using either
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1 the categorical or modified categorical approach. *See United States v. Crawford*,
 2 520 F.3d 1072, 1078 (9th Cir.2008); *Taylor v. United States*, 495 U.S. 575 (1990).

3 **1. Categorical Approach**

4 To categorically qualify as an aggravated felony, the Court compares the
 5 elements of the Washington statute to the generic definition of a “drug trafficking”
 6 crime. *See Rendon*, 520 F.3d at 974 (describing the categorical and modified
 7 categorical approach). The Court looks only to this definition under the categorical
 8 approach. “If the statute of conviction criminalizes conduct that would not satisfy
 9 the federal definition of the crime at issue, then the conviction does not qualify as a
 10 predicate offense.” *Pelayo–Garcia v. Holder*, 589 F.3d 1010, 1014 (9th Cir.2009).
 11 Here, Mr. Copas-Villegas was convicted of a Violation of the Uniform Controlled
 12 Substances Act, Possession with Intent to Deliver a Controlled Substance,
 13 Cocaine, in violation of Revised Code of Washington § 69.50.401(a) which
 14 provides:

15 (a) Except as authorized by this chapter, it is unlawful for any person
 16 to manufacture, deliver, or possess with intent to
 Manufacture or deliver, a controlled substance.

17 (1) Any person who violates this subsection with respect to:

18 (i) a controlled substance classified in Schedule I or II which is a
 19 narcotic drug . . . is guilty of a crime and upon conviction may be
 imprisoned for not more than ten years[.]

20 Wash. Rev. Code § 69.50.401(a)(1)(i) (2003). Mr. Copas-Villegas pleaded guilty
 21 to “possess[ion] with intent to manufacture or deliver cocaine, a controlled
 22 substance . . . and did know it was a controlled substance.” ECF No. 62-6, Ex. 6 at
 23 42. Under the CSA it is a federal crime to knowingly or intentionally “possess with
 24 intent to manufacture, distribute, or dispense a controlled substance.” 21 U.S.C. §
 25 841(a)(1); *see also* § 841(b)(1)(A)(ii)(II) (listing cocaine as a controlled
 26 substance).

1 Mr. Copas-Villegas argues the Washington statute includes conduct that
2 constitutes an aggravated felony and conduct that does not. Specifically, he argues
3 the Washington drug trafficking statute in this case is overbroad, because Revised
4 Code of Washington § 69.50.401(a)(1) encompasses accomplice liability under
5 Revised Code of Washington § 9A.08.020(3).¹ The Government disagrees the
6 statute is overbroad and argues there is no Ninth Circuit case on point to bolster
7 Defendant's argument. The drug statute in this case, by its own terms relates to a
8 controlled substance. Revised Code of Washington § 69.50.401(a)(1) is
9 specifically aimed at controlled substance offenses. *See e.g., Mielewczyk v. Holder*,
10 575F3d. 992, 998(9th Cir. 2009). Moreover, the Government argues a cursory
11 review of the Defendant's conviction under either the categorical or modified
12 categorical approach, definitively establishes there was no accomplice liability in
13 this case, nor did it involve solicitation.

14 The Court notes that recently the Ninth Circuit concluded in *United States v.*
15 *Vargas-Mendoza*, 450 Fed. App'x 588. 589-90 (9th Cir. 2011) (unpublished), that
16 the district court properly applied a 16-level enhancement to the defendant's
17 sentence on the ground that the defendant's prior state conviction for possession of
18 cocaine with intent to deliver under Wash. Rev. Code § 69.50.401 was a drug-
19 trafficking offense within the meaning of U.S.S.G. § 2L1.2. The Circuit held "the
20 district court properly concluded that a conviction under § 69.50.401 is
21 categorically a conviction for a 'drug trafficking offense' as defined by U.S.S.G. §
22 2L1.2(b)(1)(A)(I)." *Id.* This is the identical statute of conviction for Defendant's
23 2003 drug cocaine conviction.

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26 ¹ Wash. Rev. Code § 9A.08.020(3) reads "A person is an accomplice of another
27 person in the commission of a crime if: (a) With knowledge that it will promote or
28 facilitate the commission of the crime, he or she: (i) Solicits, commands,
encourages, or requests such other person to commit it; or (ii) Aids or agrees to aid
such other person in planning or committing it[.]"

1 In order to find that a statute of conviction describes a crime that falls
2 outside of the generic definition, it must be shown that there is a realistic
3 probability, not a theoretical possibility, that the statute of conviction would be
4 applied to conduct falling outside the generic definition. *Duenas-Alvarez v.*
5 *Gonzales*, 549 U.S. 183 (2007). In response, Mr. Copas-Villegas asserts that *State*
6 *v. Evans*, 80 Wash. App. 806, 911 P.2d 1344, 1351 (1996) and *State v. Lopez*, No.
7 13861-5-III, 1996 WL 426006, at *4 (Wash. App. Ct. July 30, 1996)
8 (unpublished), demonstrate offense conduct that included solicitation, yet the
9 defendant never possessed the drugs that he was convicted of delivering. (ECF No.
10 63 at 3). The Court is not convinced by Defendant's logic, and finds the line of
11 cases cited by Defendant as distinguishable -- as they dealt with sentencing issues.

12 That said, the result may be different in an immigration context. In *Thanh*
13 *Van Le v. Holder*, the sole issue was whether the Board of Immigration Appeals
14 correctly determined that defendant's conviction of possession of a controlled
15 substance with intent to deliver, in violation of Wash. Rev. Code § 69.50.401, was
16 an aggravated felony. 08-74865, 2012 WL 1708172, at *1 (9th Cir. May 16, 2012)
17 (unpublished). In that case, the parties agreed "that the state statute of conviction
18 [was] not categorically an aggravated felony" and the Ninth Circuit held that
19 application of the modified categorical approach was appropriate. *Id.*

20 Therefore, in light of the differing authority, in order to determine whether
21 Mr. Copas-Villegas's conviction under § 69.50.401(a) qualifies as a drug
22 trafficking offense, the Court proceeds to apply the modified categorical approach.
23 *See United States v. Almazan-Becerra*, 537 F.3d 1094, 1096 (9th Cir.2008).

24 2. Modified Categorical Approach

25 The modified categorical approach requires that a court "determine, in light
26 of the facts in the judicially noticeable documents, (1) what facts the conviction
27 necessarily rested on (that is, what facts the trier of fact was actually required to
28 find); and (2) whether these facts satisfy the elements of the generic offense."

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1 *United States v. Aguila-Montes*, 655 F.3d 915, 940 (9th Cir. 2011). Where the
2 conviction was based on a guilty plea, the Court's review is limited "to those
3 documents 'made or used in adjudicating guilt' such as judicially noticeable
4 documents (also known as *Shepard* documents):

5 (1) charging documents; (2) the terms of a written plea agreement; (3)
6 transcripts of a plea colloquy between a judge and the defendant in
7 which the factual basis for the plea was confirmed by the defendant;
8 (4) jury instructions; (5) any explicit factual finding by the trial judge
9 to which the defendant assented; and (6) some comparable judicial
10 record of this information.

11 *Aguilar-Turcios v. Holder*, --- F.3d ----, 06-73451, 2012 WL 3326618 at *4(9th
12 Cir. Aug. 15, 2012)

13 Here, the available documents include the Washington judgment, ECF No.
14 48-2, Ex. C, Facts and Law Supporting Exceptional Sentence, ECF No. 62-1, Ex.
15 1, Defendant's Statement on Plea of Guilty (*Id.* at 62-6, Ex. 6), and Defendant's
16 Plea Agreement (*Id.* at 62-7, Ex. 7). Defendant's signed Statement on Plea of
17 guilty recited the elements of § 69.50.401(a) and read "In King County,
18 Washington, [Mr. Copas-Villegas] unlawfully and feloniously did possess with
19 intent to manufacture or deliver Cocaine, a controlled substance and narcotic drug,
20 and did know it was a controlled substance. (*Id.* at 62-6, Ex. 6 at 42). Also, Mr.
21 Copas-Villegas admitted to the same, "On Nov 1, 2002, in King County,
22 Washington, I did possess with intent to deliver cocaine, knowing it was a
23 controlled substance." (*Id.* at 52).

24 Furthermore, the Facts and Law Supporting Exceptional Sentence, to which
25 Mr. Copas-Villegas assented through his counsel, detailed the circumstances
26 surrounding the charge. ECF No. 62-1, Ex. 1 at 17. On November 1, 2002, a
27 confidential cooperating witness ordered two kilograms of cocaine from Mr.
28 Copas-Villegas. *Id.* Upon arrival at the designated meeting location, the witness
identified Mr. Copas-Villegas and he was arrested. *Id.* Officers then conducted a

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1 search incident to arrest and found two kilograms of cocaine in Mr. Copas-
2 Villegas's vehicle, "an amount that is substantially and numerous times larger than
3 a personal use amount." *Id.*

4 The Court finds these facts establish the underlying conviction was for a
5 drug trafficking crime punishable under the CSA. See 21 U.S.C. § 841. Thus
6 Defendant's conviction was an aggravated felony. Defendant was not eligible for
7 voluntary departure at his 2004 deportation proceedings, and as such, the
8 Government did not violate his right to Due Process, nor was he actually
9 prejudiced. The Defendant's Motions to Dismiss are denied.

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. Defendant's Motions to Dismiss Indictment, Case No. CR-12-0021-
12 RHW, ECF No. 48 and to Dismiss Petition for Violation of Supervised Release,
13 Case No. CR-08-0021, ECF No. 66 are **DENIED**.

14 2. Defendant's Motions to Expedite, ECF No. 46 in Case No. CR-12-021-
15 RHW and ECF No. 64 in Case No. CR-08-021-RHW are **GRANTED**.

16 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
17 Order and forward copies to counsel and U.S. Probation.

18 **DATED** this 5th day of October, 2012.

19
20 s/Robert H. Whaley
21 ROBERT H. WHALEY
22 Senior United States District Judge
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